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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

ANNE C. BELL, Petitioner

vs.

LOWRY M. BELL, JR., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

John P. White, Jr.
Counsel for Petitioner
White, Inker, Aronson,
Connelly & Norton, P.C.
One Washington Mall
Boston, Ma. 02108
(617) 367-7700

Of Counsel:

Monroe L. Inker
Margot Ames Clower
Ann Wagner

46pp

QUESTIONS PRESENTED

1. Whether the termination of petitioner's support payments ordered under a judgment of divorce solely upon the ground of petitioner's intimate association with an unrelated man on a regular basis violates petitioner's rights of association and privacy guaranteed by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

2. Whether, in terminating petitioner's support payments ordered under a judgment of divorce solely upon the ground of petitioner's intimate association with an unrelated man on a regular basis, the court below created a classification with no rational relationship to any legitimate state

objective in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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OPINIONS BELOW

The findings of fact and conclusions of law of the Probate Court for the county of Norfolk, which dismissed petitioner's complaint for contempt, are unreported and are appended hereto at p. A-44. The opinion of the Court of Appeals for the Commonwealth of Massachusetts, which reversed the judgment of the Probate Court, is officially reported at 16 Mass.

App. Ct. 188 and is unofficially reported at 459 N.E.2d 109 (1983), and is appended hereto at p. A-19. The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, which affirmed the judgment of the Probate Court, is officially reported at 393 Mass. 20 and is unofficially reported at 468 N.E.2d 859 (1984), and is appended hereto at p. A-1.

STATEMENT OF JURISDICTIONAL GROUNDS

(i) Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Judicial Court for the Commonwealth of Massachusetts made and entered on September 13, 1984, and appended hereto at p. A-65.

(ii) Petitioner filed no petition for a rehearing in the court below and made no application for an extension of time within which to petition for

a writ of certiorari.

(iii) (not applicable)

(iv) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First, Fourth, Ninth and section one of the Fourteenth Amendments to the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case has its genesis in a judgment of divorce entered in the Probate Court for the county of Norfolk, Massachusetts, on April 28, 1976, nunc pro tunc November 28, 1975, when petitioner and respondent were divorced after twenty-six years of marriage

(R. 5-6).[1] The judgment of divorce, by reference to an agreement of the parties, ordered that respondent make significant monthly alimony payments to petitioner for a period of fifteen years, or until the happening of any one of several contingencies, including petitioner's living together with a member of the opposite sex, so as to give the outward appearance of marriage (R. 12). For convenience, this contingency provision is hereafter sometimes referred to as the "outward appearance clause".

In a four-to-three decision, the Massachusetts Supreme Judicial Court interpreted this outward appearance clause to apply to petitioner's "sharing a bedroom with a man on a regular basis

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[1]Unless otherwise indicated, references are to the printed record submitted in the Appeals Court below as an "Appendix to the Briefs".

for approximately three years," and held that petitioner has thereby forfeited her right under the judgment of divorce to alimony. Bell v. Bell, 393 Mass. 20, 22, 468 N.E.2d 859, 861 (1984) (Appendix, appended hereto, at p. A-6). Petitioner claims that this construction and application of the outward appearance clause violates her federal constitutional rights to privacy and freedom of association and to equal protection and due process of the laws. The Massachusetts Supreme Judicial Court expressly declined to consider petitioner's federal constitutional claims on the ground that those claims were not seasonably raised. Petitioner recognizes that as a general rule failure to raise a federal question at the stage of proceedings required by state law precludes review by this Court. However, this case falls within

exceptions to this general rule.

Whether a federal question has been sufficiently and timely raised in a state court is itself a federal question that this Court can decide for itself. Street v. New York, 394 U.S. 576, 583 (1969); Douglas v. Alabama, 380 U.S. 415, 420-423 (1963). As a matter of federal law, it is well-established that a federal claim was timely raised if the ruling of the state court could not reasonably have been anticipated and the federal claim was raised at the earliest opportunity. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n. 9 (1980); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 677-678 (1930); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917). In this case, the construction given the outward appearance clause

by the State Supreme Judicial Court was unforeseeable and indefensible by reference to prior Massachusetts decisions.[2]

Petitioner is well aware that this Court has no power to revise the judgment of the Massachusetts Supreme Judicial Court on questions of state law. The following discussion of Massachusetts substantive law is necessary to show that the construction given the outward appearance clause by the court below was unforeseeable, in support of petitioner's view that, as a matter of federal law, her federal constitutional claims were seasonably raised in the state court.

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[2]Neither party advocated the construction given to the clause by the court below. Nor was such a construction adopted by any judge who had interpreted the outward appearance clause previously in the course of this litigation.

While there is no prior Massachusetts decision involving a provision for the termination of alimony identical to the outward appearance clause herein, there are numerous decisions dating back to the last century involving the termination of alimony payments on account of the "remarriage" of the woman, which remarriage had in most of the cases been annulled. In all of the cases where alimony was ordered terminated, the ratio decidendi was either that, as a result of the remarriage, the woman had acquired a right to be supported by another man, Glazer v. Silverman, 354 Mass. 177, 179 (1968); Southworth v. Treadwell, 168 Mass. 511, 513 (1897) or that termination of alimony payments was equitable under the particular circumstances of the case, Surabian v. Surabian, 362 Mass.

342, 348 (1972); Gerrig v. Sneirson, 344 Mass. 518, 520-521 (1962). In two other cases, the court found that the circumstances relating to the wife's need for support had not changed as a result of her remarriage, and so refused to modify its order for alimony. Robbins v. Robbins, 342 Mass. 247, 252 (1961); Ziegler v. McKinlay, 318 Mass. 765, 767 (1945).

Any doubt that the dispositive criteria in Massachusetts in cases involving termination of alimony payments have been support and other equitable considerations is eliminated by Heistand v. Heistand, 384 Mass. 20 (1981). In Heistand, the Supreme Judicial Court summarized the applicable law as follows:

> Because the law of New York entitled the wife to support from her second husband after annulment of her remarriage, this

> court in Glazer[3] deemed it inequitable to allow the wife to receive support from two husbands. Id. at 180. In that case this court also evaluated a ceremonial, invalid marriage according to its effect on third parties. Id. at 178. This court declined to hold a husband liable for alimony where he was entitled to rely on the apparent validity of his former wife's remarriage. . . . Neither of the criteria dispositive in Glazer -- double support or third-party reliance -- is evidence on the record before us. Heistand v. Heistand, 384 Mass. 20, 24-25 (1981).[4]

Thus there is ample precedent in Massachusetts decisions for resolving disputes relating to the termination of alimony payments to women who had re-

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[3]Glazer v. Silverman, 354 Mass. 177 (1968).

[4]The Supreme Judicial Court reached this conclusion in spite of undisputed evidence that the woman participated in a symbolic marriage ceremony, exchanging vows and sending out printed announcements and the man she "married" thereafter moved into her house & paid her former husband the $15,000 by which the woman acquired full title to the house. Id. at 22.

married or who had formed a "'spousal-oriented' relationship," Id. at 24, by weighing support and other equitable considerations. This has been the rule whether the case arose as a contract action based upon an agreement of the parties or as a contempt or modification proceeding based upon the judgment of divorce.

Need for support has also always been an essential consideration in Massachusetts in regard to an award of alimony; adultery or other misconduct of the wife, standing alone, has never been sufficient grounds to deny alimony. Graves v. Graves, 108 Mass. 314, 317-318 (1871); Clifford v. Clifford, 354 Mass. 545, 548 (1968). Over the last century Massachusetts courts have evolved to the view that "(o)rdinarily matters such as custody, support and alimony are not

affected by such general considerations as the relative moral rectitude of the spouses or which spouse is awarded the divorce." Davisson v. Davisson, 12 Mass. Ct. App. 420, 425 N.E.2d 762, 765 (1981), further app. review denied, 425 N.E.2d 762 (Mass. 1981). See also Partridge v. Partridge, 14 Mass. App. Ct. 901, 919 (1982), wherein the Appeals Court reversed an order denying alimony to a woman who was living with a male companion, because the Appeals Court found ". . . no indication of the amount of support provided the wife by her companion or whether it constitutes a dependable financial resourse." Id. at 919.

The construction given the outward appearance clause by the court below represents a radical departure from prior Massachusetts law in a second

important respect. Since 1840 Massachusetts has had a statute which provides in pertinent part that "(m)arriage may be proved . . . by evidence of general repute or of cohabitation of the parties as married persons . . ." Mass. Gen. Laws Ann. c. 207, §47. Decisions under this statute make it clear that "cohabitation as married persons" has always been distinguished in Massachusetts from "illicit" or "meretricious" cohabitation. Riley v. Murphy, 265 Mass. 420 (1929); Edwards v. Cockburn, 264 Mass. 112 (1928); Finer v. Steuer, 225 Mass. 611 (1926); Meyers v. Pope, 110 Mass. 314 (1872); Loring v. Thorndike, 87 Mass. 257 (1862). In all of these decisions, there was a holding out as man and wife by the cohabitants and/or a recognition of their relation as husband and wife by

family, friends and the general community. See also, Newburyport v. Boothbay, 9 Mass. 414 (1812). For example, in Riley v. Murphy, 265 Mass. 420 (1929), the factors relied upon by the court in finding that the parties' cohabitation evidenced marriage included the woman's holding herself out as the man's wife, her use of his surname on her bank accounts, and the couple's consistent reputation as husband and wife amongst their family, their neighbors and the community.

In Edwards v. Cockburn, 264 Mass. 112 (1928), the Supreme Judicial Court stated:

> Mere cohabitation of a man and woman alone is not, under the statute, evidence of marriage. They must so cohabit "as married persons", and not live together merely in illicit intercourse. Id. at 125.

In regard to evidence of reputation of

marriage, the court further stated:

> . . .(T)he weight of such evidence is to be determined to a great degree by the standards of living and the character of the people in the community. There was evidence that, when Crabtree and Annie Leopold were living in Tombstone, many men and women were living there together who were not married, and that fact was generally known. In such circumstances evidence of repute that a man and woman who were living together were married might be entitled to less weight than would be given to similar evidence in a community where correct standards of conduct were more strictly observed. Id. at 126.

If cohabitation in "illicit intercourse" in Tombstone, Arizona in 1881 was not treated as cohabitation "as married persons" by the Supreme Judicial Court in 1928, petitioner could not reasonably be expected to anticipate the holding of the Supreme Judicial Court in this case that sharing a bedroom with a man in Boston in the 1980's on a

regular basis constitutes an outward appearance of marriage. It may not reasonably be held that petitioner was bound to anticipate such a construction, and thus raise federal constitutional challenges to the outward appearance clause at the outset of this litigation. For this reason, the ruling of the court below that petitioner's constitutional claims were not seasonably raised presents no bar to the exercise of certiorari jurisdiction by this court.[5]

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[5]The circumstances of this case satisfy the requirement that federal claim be raised at the earliest opportunity. The federal questions which petitioner asks this court to review were briefed and argued before the Massachusetts Supreme Judicial Court. See, Supplemental Brief of the Appellant to the Supreme Judicial Court at pp. 9-17. See also, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n. 9 (1980) (federal constitutional claim first raised before State Supreme Court in brief in response to amici curiae briefs.

Massachusetts' state procedural rule should not bar review of petitioner's federal constitutional claims for an additional reason. The Massachusetts Supreme Judicial Court declined to consider petitioner's constitutional claims, although possessed of power to do so under state law. This Court stated the federal rule in Williams v. State of Georgia, 349 U.S. 375 (1955):

> A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. Id. at 383.

See also, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), where the state court had denied the petitioners' state appeals because of their failure to comply with a state rule of appellate procedure, and this Court granted review because the state

court had not:

> . . .so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim here presented if the Supreme Court of Appeals desires to do so. See Henry v. Mississippi, 379 U.S. 443, 455-457, . . . (Black, J., dissenting). Such a rule, more properly deemed discretionary than jurisdictional, does not bar review here by certiorari. Id., 396 U.S. at 234.

The Massachusetts Supreme Judicial Court declined to consider petitioner's constitutional claims in spite of well-established Massachusetts law that an agreement violative of some fundamental principle of public policy will not be enforced by the Supreme Judicial Court, even though the issue of the legality of the agreement was not raised below. O'Donnell v. Bane, 385 Mass. 114, 117 (1982) (dictum); Gleason v. Mann, 312 Mass. 420, 422 (1942); Reuter v. Ballard,

267 Mass. 557, 563 (1929). There can be no question that individual rights guaranteed by the Constitution of the United States express fundamental principles of public policy. The Supreme Judicial Court has applied the well-established rule that an agreement violative of a fundamental principle of public policy will not be enforced in a case involving an agreement argued to be in restraint of marriage. Gleason v. Mann, 312 Mass. 420 (1924). Nor will agreements which include sexual intercourse or cohabitation as part of the consideration be enforced as against public policy. Green v. Richmond, 369 Mass. 47 (1975); Zytka v. Dmochowski, 302 Mass. 63 (1938). Thus, the fact that the Supreme Judicial Court declined to entertain petitioner's constitutional claims, while treating kindred issues

differently, does not bar review by this Court.

Finally, the fact that the court below was applying a provision in a judgment of divorce, incorporated by reference to an agreement of the parties, does not insulate that court's judgment from constitutional scrutiny. A transgression of constitutional rights "is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid [cite omitted] state statute." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930). Here, the court below accomplished the transgression in the course of construing and enforcing an otherwise valid provision in a judgment of divorce.

Under Massachusetts law, a judgment for divorce providing for alimony "does not rest upon the agreement of the

parties," but rather rests upon the court's statutory authority. Surabian v. Surabian, 362 Mass. 342, 346 (1972) (provision in parties' agreement for termination of alimony upon remarriage of wife incorporated in divorce judgment). In determining the effect of a termination provision incorporated in a judgment of divorce by reference to an agreement, "it is the court's intention which must be ascertained." Id. at 347. Furthermore, an agreement between the parties will not be enforced in a contempt proceeding unless "a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the agreement . . . was fair and reasonable at the time of entry of the judgment nisi. . ."[6]

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[6]Under Massachusetts law a separation agreement does not stand "upon the same footing in all respects as ordinary contracts. . ." Bailey v. Dillon, 186 Mass. 244, 247 (1904). Nor is the freedom of parties "to limit or waive their legal

Knox v. Remick, 371 Mass. 433, 436 (1976). See also, Dominick v. Dominick, 18 Mass. App. Ct. 85, 92, further app. review denied, 392 Mass. 1103 (1984).

Neither petitioner nor respondent ever argued that petitioner's sleeping arrangement, standing alone, was a sufficient basis to find an "outward appearance of marriage." That view of the outward appearance clause originated with a bare majority of the court below. There is absolutely nothing in the record of this case to suggest that petitioner ever agreed to a termination of her alimony payments in the event she should share a bedroom with a man on a regular basis. Petitioner agreed to a termination of support if her living arrangement gave an

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[6](cont.) rights in the event of a divorce . . . appropriately left unrestricted." Osborne v. Osborne, 384 Mass. 591, 599 (1981).

"outward appearance of marriage." As the dissenters in the court below observed, sharing a bedroom is a private matter and presents no outward appearance of anything. Bell v. Bell, 393 Mass. 20, 25, 468 N.E.2d 859, 862 (1984) (Wilkins, J., dissenting, with whom Liacos and Abrams, JJ., join) (Appendix appended hereto at A-12).[7]

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[7]See also, Commonwealth v. Catlin, 10 Mass. 8 (1803), wherein an indictment for "open gross lewdness and lascivious behavior" was dismissed, because the testimony of witnesses who had observed the defendant in bed with a woman in a very familiar situation on separate occasions proved nothing more than secret or private lewdness and lascivious behavior. (emphasis in original)

REASONS FOR GRANTING THE WRIT

This case squarely presents an important question of federal law which has not been, but should be, settled by this Court. That question is whether termination of alimony payments based exclusively on a divorced woman's post-divorce intimate association[8] with an

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[8]The right at issue in this case is appropriately characterized as a right to "intimate association". This case does not concern sexual behavior per se but an inference of sexual behavior based wholly upon the sharing of a bedroom. In the course of petitioner's testimony at the contempt hearing, covering 62 pages of the trial transcript, there were only two questions that could conceivably be characterized as touching upon the intimate or private aspects of petitioner's association. After establishing that the apartment shared by petitioner consists of a living room and a bedroom, counsel for respondent inquired of petitioner:

"Q. You sleep in the bedroom?
A. Yes.
Q. And does J.R. sleep in the bedroom?
A. Yes." (R. 70)

The construction of the outward appearance clause by the court below rests exclusively on this testimony.

unrelated man violates that woman's rights to privacy and freedom of association and to due process and equal protection of the laws guaranteed by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

1. This is an appropriate case for an extension of the right to privacy first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, this Court struck down a state statute which prohibited the use of contraceptives as an unconstitutional infringement of "an intimate relation of husband and wife," Id. at 482. Justice Douglas, writing for the majority, stated:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of

> privacy surrounding the marriage relationship. Id. at 485-486.

Subsequently this Court recognized the constitutionally protected right of an individual "to satisfy his intellectual and emotional needs in the privacy of his own home." Stanley v. Georgia, 394 U.S. 557, 565 (1969) (state obscenity statute, insofar as it punished mere private possession of obscene matter, violated First Amendment).

In Eisenstadt v. Baird, 405 U.S. 438 (1972), this Court, relying upon Griswold, held that a Massachusetts statute which barred the distribution of contraceptives to single persons violated the equal protection clause of the Fourteenth Amendment. Justice Brennan, writing for the majority, indicated that the zone of privacy articulated in Griswold protects single persons in

regard to fundamental decisions, as follows:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557 . . . (1969). Id. at 453.

See also, Roe v. Wade, 410 U.S. 113 (1973) (right of personal privacy extends to the decision by a single woman whether to have an abortion).

This case squarely presents governmental intrusion into petitioner's intimate conduct within the privacy of her own home. Because the court below chose to focus exclusively on that

conduct, this case lends itself to a reasonably narrow extension of the right of privacy and freedom of association to the intimate and unobstrusive association of single adults within the privacy of their own homes.

2. The question whether any federal constitutional restraints come into play when continued payment of alimony pursuant to a judgment of divorce is conditioned on the recipient's foregoing certain intimate associations presses for an answer. A majority of the state courts of last resort have rejected the view of the court below that court-ordered alimony payments may be terminated based solely upon a recipient's intimate associations or relations.[9]

[9] See, Byrd v. Byrd, 252 Ark. 202, 478 S.W.2d 45 (1972); Husband B.W.D. v. Wife B.A.D., 436 A.2d 1263 (Del. 1981) (equally-divided court); Alibrando v. Alibrando, 375 A.2d 9 (D.C. Ct. of App.

Only one other state court of last resort had been found that has adopted the extreme minority view of the court below.[10]

State legislatures, on the other hand, have enacted statutes that appear, at least on their face, to represent a servious intrusion of government in the private lives of divorced individuals.[11]

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[9] 1977); Daniels v. Daniels, 82 Idaho 210, 351 P.2d 236 (1960); Fleming v. Fleming, 221 Kan. 290, 559 P.2d 329 (1977); Mitchell v. Mitchell, 418 A.2d 1140 (Me. 1980); Abbott v. Abbott, 282 N.W.2d 561 (Minn. 1979); Bowman v. Bowman, 163 Neb. 336, 79 N.W.2d 554 (1956); Gayet v. Gayet, 92 N.J. 149, 456 A.2d 102 (1983); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979); Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494 (1978); Wolfe v. Wolfe, 46 Ohio St. 399, 350 N.E. 2d 413 (1976); Myhre v. Myhre,269 N.W.2d 905 (S.D. 1980); Wight v. Wight, 284 S.E.2d 625 (W. VA. 1981); Van Gorder v. Van Gorder, 110 Wis.2d 188, 327 N.W.2d 674 (1983).

[10] See, McRae v. McRae, 381 So.2d 1052 (Miss. 1980); Rubisoff v. Rubisoff, 242 Miss. 225, 133 So.2d 534 (1961).

[11] See, Alabama Code §30-2-55 (1983)

In addition, these statutes, like the decision of the Court below, create an arbitrary classification wholly without rational basis. It is only the economically disadvantaged spouse whose intimate relations and associations are constrained, irrespective of the impact of those associations upon the economic need of that spouse. Four state

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("living openly or cohabiting with a member of the opposite sex" requires termination of alimony); Georgia Code Ann. §30-220 (b) (1980) ("dwelling together continuously and openly in a meretricious relationship with a person of the opposite sex" shall be grounds to modify provisions for alimony); Pennsylvania Stat. Ann. tit. 23, §507 (Purdon Supp. 1984-1985) (where recipient of alimony "has entered into cohabitation with a person of the opposite sex" subsequent to divorce, alimony terminated); Utah Code Ann. §30-3-5 (3) (Supp. 1983) ("residing with a person of the opposite sex" requires termination of alimony unless established by recipient of alimony "that the relationship or association between them is without any sexual contact").

statutes challenged on federal constitutional grounds based upon the Equal Protection and Due Process Clauses have been upheld by state courts on various grounds.[12] No reported decision has been found wherein a state court considered a federal constitutional challenge based upon the rights to privacy and freedom of association.[13]

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[12]See, Ivey v. Ivey, 378 So.2d 1151, 1152 (Ala. Civ. App. 1979) (challenge to Ala. Code §30-2-55 on equal protection grounds dismissed as "too nebulous" for court's understanding); Sims v. Sims, 245 Ga. 680, 266 S.E.2d 492 (1980) (Ga. Code Ann. §30-220(b) upheld as rational classification which furthers legitimate governmental objectives); Hall v. Hall, 82 Misc.2d 814, 372 N.Y.S.2d 344 (Fam. Ct. 1976), affirmed mem., 55 A.D.2d 752, 389 N.Y.S.2d 448 (3rd Dept. 1976) (N.Y. Dom. Rel. Law §248 makes a rational distinction between persons living in a temporary liaison and those living together in a more permanent relationship); Roberts v. Roberts, 657 P.2d 153, 155 (1983) (three judges dissenting) (Okla. Stat. Ann. tit. 12, §1289(D) not violative of equal protection and due process as requires proof of change in need for support or ability to support).

[13]A number of commentators have

What effect the cohabitation of an alimony recipient has on the obligation of the payor is primarily a matter for state courts and legislatures. But there is a need for constitutional restraint on governmental intrusion in this area. A recognition that the federal constitution places a limit on governmental intrusion into the intimate

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[13]suggested that termination of alimony based upon the recipient's cohabitation constitutes a violation of constitutionally protected privacy, as well as a violation of the Equal Protection Clause. See, Note, "Alimony, Cohabitation and the Wages of Sin: A Statutory Analysis", 33 Ala, L. Rev. 577, 608-612 (1982) (Ala. Code §30-2-55 may be unconstitutional); Strickman, "Marriage, Divorce and the Constitution", 22 Boston College L. R. 935, 991 (1981); Note, "Domestic Relations: Oklahoma's Live-In Lover Statute: §1289(D) of Title 12", 36 Okla. L. Rev. 906, 914-915 (1983) (Oklahoma statute unconstitutional); Comment, "The Effect of Third Party Cohabitation on Alimony Payments", 15 Tulsa L. J. 772, 773 n, 6 (1980); Note, Alimony Modification: Cohabitation of Ex-Wife with Another Man, 7 Hofstra L. Rev. 471, 494-496 (1979) (N.Y. Dom. Re. Law §248 unconstitutional).

associations of divorced persons will affect contruction of existing state statutes, as well as affect the drafting of new legislation. It will also have an immediate and far-reaching impact upon the drafting of agreements between the parties to a divorce proceedings.[14]

3. The primary beneficiaries of federal constitutional protection will be women, divorced after long-term marriages, who, because of their fulltime homemaking roles, have the least opportunity to achieve financial independence

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[14]Domestic relations form books generally suggest inclusion of a clause in a separation agreement providing for termination of alimony upon cohabitation. Examples of suggested language are: "cohabitation with another person with whom she has a romantic relationship," S. Green and J. Long, Marriage and Family Law Agreements, 372-373 (1984); and "(c)ohabitation with a person of the opposite sex without marriage shall be deemed a remarriage," J.F. Lombard, Family Law §1309 (West. Supp. 1984).

and thus require support over a significant period of time.[15] The

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[15]Petitioner and respondent were married for twenty-six years and have two adult children (R.1.). At the time of their divorce, respondent was an executive with a major corporation; he has since remarried (R.153). At the time of the contempt hearing, petitioner was sharing a two-room apartment and was collecting unemployment compensation (R.34,69).

Statistical studies belie the assumption that a choice of cohabitation rather than remarriage is made to avoid provisions for termination of alimony upon remarriage. See, Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," 28 U.C.L.A. L. Rev. 1181, 1221-1226 (1982). Opportunity for remarriage is largely a function of a woman's age at the time of her divorce. A woman forty or older has a 28% chance of remarriage, while a woman under thirty has a 75% chance of remarrying. Id. at 1229. One study found that, in a group of individuals married 18 or more years, 36% of the men had remarried within a year after the divorce compared to 6% of the women. An additional 10% of the men and 6% of the women had a permanent cohabitant in their post-divorce household. Weitzman and Dixon, "The Alimony Myth: Does No-Fault Divorce Make a Difference?," 14 Family Law Quarterly 141, 177 (1980).

transition of these women from marriage to independence is difficult enough without the intrusion of the state into their intimate associations.[16] Divorced women must be permitted to seek intimate associations within the privacy of their own homes freed of the threat of forfeiture of their economic support and secure in their fundamental and equal rights to privacy and association.

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[16]The social and emotional difficulties faced by women divorced after long-duration marriages are detailed in Journal of Geriatric Psychiatry, Vol. 15, no. 2 (1982); in Ruth Harriet Jacobs, Life After Youth (1979); and in U.S. House of Representatives Select Committee on Aging, Women in Midlife - Security and Fulfillment, Vol. 1 (1979).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

John P. White, Jr.
Counsel for Petitioner
White, Inker, Aronson,
Connelly and Norton
One Washington Mall
Boston, Massachusetts 02108
(617) 367-7700